144.

The Ontario Human Rights Code, R. S. O. 1970, C. 318, as amended

IN THE MATTER OF: The complaints of Teresa Fay Cox and Debbie Cowell, both of Guelph, Ontario, that they were discriminated against in employment by reason of being dismissed, being refused employment, or being refused to be continued to be employed, and/or with regard to a term or condition of employment, because of their sex by Jagbritte Inc., and Super Great Submarine and Good Eats and Jagjit Singh Gadhoke, and their servants and agents, 298 Victoria Road North, Guelph, Ontario.

A HEARING BEFORE: Peter A. Cumming, a Board of Inquiry appointed under the Ontario Human Rights Code by the Honourable Robert G. Elgie the 8th day of May, 1980.

Decision and Order

1. Preliminary Point

At the commencement of the hearing, the individual Respondent requested an adjournment, and there was a good deal of discussion with respect to such request (Exhibit Nos. 1 to 8; Transcript, pp. 1 to 29). The request was denied because it was obvious the Respondent had no real excuse for not being prepared to then proceed, nor for the situation that he was then without counsel. (Transcript, p. 28).

Mr. Gadhoke's strategy was to ignore and avoid legal proceedings in the hope they would somehow go away (Transcript, pp. 44 to 53; Exhibit Nos. 16, 17, 18).

Dorothy Barnes, investigator for the Ontario Human Rights Commission, testified that she had a great deal of difficulty in dealing with Mr. Gadhoke during the investigation. Given all the evidence, I have no doubt in saying that Mr. Gadhoke did his best to delay, frustrate and avoid the investigation into the Complaints made against him. Moreover, while he has some difficulty in speaking English, I found him to be very good in his comprehension of the language and quite intelligent. He tried to utilize the fact that his

background is that of being from India, and the fact that his first language is not English, as both a camouflage and an excuse for his actions which are the subject of the Complaints.

Mr. Gadhoke requested a postponment in proceeding with the Inquiry, at the outset of the hearing, suggesting that due to problems in obtaining counsel and his not being prepared, the hearing should be adjourned. A good deal of time was spent considering his request, and reviewing various items of correspondence introduced into evidence (Transcript, pp. 6 to 27). At the conclusion of the submissions I had no doubt in ruling that Mr. Gadhoke was solely responsible for the position he was then in, and had reached that position without any reasonable excuse, and that the hearing should proceed. Indeed, it was clear to me that Mr. Gadhoke himself had manufactured every excuse he could imagine, simply to try to avoid the hearing taking place.

2. The Treatment of Sexual Harassment Under Human Rights Legislation

The Ontario Human Rights Code R.S.O. 1970, c.318 provides:

> 4. (1) No person shall,
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> . . .
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> (b) dismiss or refuse to employ or to continue to employ any person;
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> . . .
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> (g) discriminate against any employee with regard to any term or condition of employment,
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> because of .... sex .... of such person or employee.

To make out a case of sexual harassment in Ontario a complainant must bring her/his complaint under this section. The question then becomes: Is section 4 broad enough to accommodate the situation where an employee is harassed by sexual advances in the workplace?

This question was addressed in the Ontario case of Cherie Bell v. Ernest Ladas (Aug. 12, 1980) 1 C.H.R.R. D/155. There, the Board of Inquiry (Mr. O.B. Shime, Q.C.) held that sexual harassment could be a form of sex discrimination prohibited by section 4 of the Code. The Board stated:

> Clearly a person who is disadvantaged because of her sex is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, or exacts some form of sexual compliance to improve

> or maintain her existing benefits. The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, and all of its benefits free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against. (p. D/156)

In that case, the complainant had been dismissed from her employment as a waitress in a restaurant co-owned by the respondent. She complained that the respondent had made sexually suggestive remarks to her which she understood to be propositions. In any case, she did not accede to the respondent's advances. She was eventually fired.

The Board of Inquiry found that there was really no connection between the respondent's propositions and the complainant's dismissal. She had been dismissed because of her incompetence as a waitress, not because of her resistance to her employer's advances. In fact, she had been dismissed by the respondent's brother, not the respondent himself.

The Bell decision though, is helpful for its discussion of the legal treatment of sexual harassment cases under the Ontario Human Rights Code. It is clear from the decision that the Board felt that a complainant has the onus of showing that compliance with a superior's sexual advances was a term or condition of employment:

> [D]ifferences of opinion by an employee where sexual matters are discussed may not involve a violation of The Code; it is

> only when the language or words may be reasonably construed to form a condition of employment that The Code provides a remedy. Thus, the frequent and persistent taunting by a supervisor of an employee because of his or her colour is discriminatory activity under The Code and, similarly, the frequent and persistent taunting of an employee by a supervisor because of his or her sex is discriminatory activity under The Code. (p. D/156)

Thus, although The Board makes it a strict necessity that a complainant show that sexual compliance was a "condition of employment", it also appeared willing to give a broad meaning to that phrase:

> The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propostions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law, which reaches into the work-place so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychoglgical and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment. (p. D/156).

The issue as to whether human rights legislation may be invoked by victims of sexual harassment has been dealt with in a series of recent United States' cases. The applicable statute in the U.S. is The Civil Rights Act of 1964, as amended by the Equal Employment Opportunities Act of 1972 42 U.S.C. s.s. 2000 e et seq. Sebsection 2(a) of the latter Act provides:

> 2 (a) Employers. It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ..... sex ....

The first case dealing with the applicability of that statute to a sexual harassment situation was Corne v. Bausch and Lomb, Inc. 390 F. Supp. 161 (1975), (U.S.D.C. Ariz.) The two plaintiffs in that case had been subjected to repeated sexual advances by their supervisor. Frey, D.J. held that the plaintiffs had failed to state a cause of action under the Civil Rights Act.

The Court stated that sex discrimination cases had always been founded on company policies, not on the "personal proclivity" of a supervisor. Further, there was no sex discrimination per se in the Court's opinion since, if males had also been victims of harassment, there would be no grounds for a suit. Frey, D.J. continued:

> Also, an outgrowth of holding such activity to be actionable under Title VII [of the Civil Rights Act] would be a federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual. (p. 163).

That interpretation however, did not long persist. A conflicting judgement was handed down the following year in Williams v. Saxbe 413

F. Supp. 654 (1976), (U.S.D.C. D.C.). There, the plaintiff had been fired for her failure to accept the sexual invitations of her supervisor. Richey, D.J. held that sexual harassment was prohibited sex discrimination under the Civil Rights Act:

> It was and is sufficient to allege a violation of Title VII [of the Civil Rights Act] to claim that the rule creating an artificial barrier to employment has been applied to one gender and not to the other. (p. 659).

In Barnes v. Costle 561 F.2d 983 (1977), (U.S.C.A. D.C. Cir.), the plaintiff had been promised a promotion within 90 days of her hiring. Her boss soon began making sexual advances by suggesting after-hours rendezvous, making sexual remarks and indicating that the plaintiff's employment status would be enhanced if she complied with his requests. These advances were all resisted by the plaintiff. The supervisor then began to harass the plaintiff and eventually abolished her position.

Robinson, C.J. found that the plaintiff's boss had acted in a retaliatory fashion. As such, the plaintiff's sexual compliance had indeed become a term of her employment:

> [R]etention of her job was conditioned upon submission to sexual relations - an exaction which the supervisor would not have sought from any male. (p. 989).

The Court read the Civil Rights Act as a general prohibition against all sex-based discrimination. As such, it was held, it should be construed liberally in its application to novel employment circumstances.

This same interpretation of the Civil Rights Act was applied in the case of Garber v. Saxon Business Products 552 F.2d 1033 (1977), (U.S.C.A. 4th Cir.) In a per curiam judgement; the Court stated that sexual harassment, where employees are compelled to submit to sexual advances as part of their employer's policy and the employer acquiesces in such practices, gives rise to a cause of action against the employer.

Thus, the Courts were willing in these cases to interpret the words "discriminate against any individual ... because of such individual's sex" is Section 2 of the Civil Rights Act in a broad way. Since greater expectations were made of women employees in these cases, they had been discriminated against on the basis of sex.

A more restrictive interpretation however, was placed on the words "terms, conditions or privileges of employment" in section 2 of the Act. For the plaintiff to succeed, she must show that her continued employment was contingent on her acceptance of a supervisor's sexual advances. Also, it may be necessary, in order to assert that one's employer is liable in a particular case, to show that the harassment is part of an employment policy, whether explicit or implicit: Garber.

In Munford v. James T. Barnes & Co. 441 F. Supp. 459 (1977), (U.S.D.C. Mich.), the plaintiff was told by her supervisor that her job might depend on submission to his sexual advances. In fact, the

supervisor told the plaintiff that she must accompany him on a business trip and stay in a motel and have sex with him or be fired. She was fired. The plaintiff complained to a more senior supervisor, but that person refused to act.

After reviewing the cases referred to above, the Court stated:

> Reading the case law as a whole, one must infer that two distinct but interrelated questions comprise the issue of whether sexual harassment constitutes sex discrimination under Title VII. First, the court must decide whether sexual harassment is the type of activity comtemplated by the Act's proscription, and secondly, the court must consider what constitutes an employment practice for which an employer may be liable. (p. 465)

The Court went on to find that the Civil Rights Act prohibits "any impediment to employment which affects one gender but not the other" (p. 465). Further, since the employer refused to act on the complaint of the plaintiff, it had given its tacit support to the harassment and was therefore liable.

In Tomkins v Public Service Electric and Gas Co. 568 F. 2d 1044 (1977), (U.S.C.A. 3rd Cir.), the plaintiff was hired by the defendant company and proceeded to advance in her position as a secretary. Her supervisor then invited her to lunch, allegedly to discuss the plaintiff's employment evaluation. At that time, the supervisor made sexual advances and advised that compliance would be necessary for a "satisfactory working relationship". When the plaintiff rejected the advances, the supervisor threatened her with recrimination should she make any complaint and physically restrained her from leaving the restaurant.

After that incident, the plaintiff was transferred, given an inferior position, given poor evaluations, disciplined by lay-offs and threatened with demotion. She was eventually fired.

Aldisert, C.J. stated that to succeed, a plaintiff must show

> ...that the acts complained of constituted a condition of employment, and that this condition was imposed by the employer on the basis of sex. (p. 1046)

He went on to find that on the facts, both of these elements were present in the case. In reviewing the relevant case law, Aldisert, C.J. concluded:

> The courts have distinguished between complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances, finding Title VII violations in the latter category. This distinction recognizes two elements necessary to find a violation of Title VII [of the Civil Rights Act]: first, that a term or condition of employment has been imposed and second, that it has been imposed by the employer, either directly or vicariously, in a sexually discriminatroy fashion. (p. 1048)

There is an underlying concern in these cases about possible legal intervention into what may be essentially personal relationships, even though the relationships take place in the workplace. In Heelan v. Johns-Manville Corp. 451 F. Supp. 1382 (1978), Finesilver, D.J. stated:

> Title VII should not be interpreted as reaching into sexual relationships which may arise during the course of employment,

> but which do not have a substantial effect on that employment. (p. 1388)

In that case, the plaintiff was credited with an excellent work record until she was put into the position of having to refuse her supervisor's romantic advances. She was explicitly told that her advancement and indeed, even her continued employment, was dependent on her having an affair with her supervisor. She was eventually fired.

The Court set out the legal position of the plaintiff as follows:

> Thus, to present a prima facie case of sex discrimination by way of sexual harassment, a plaintiff must plead and prove that (1) submission to sexual advances of a supervisor was a term or condition of employment, (2) this fact substantially affected plaintiff's employment, and (3) employees of the opposite sex were not affected in the same way by these actions. (p. 1389)

On the facts presented by the plaintiff, the Court found that her complaint had indeed been made out.

There must, of course, be a causal connection between the harassment and adverse employment consequences. In some cases this was determined to be inherent in the meaning of "a term or condition of employment": Barnes; Tomkins. In the Heelan case though, the burden of showing causation was made separate from the burden of showing that the harassment was a "term or condition of employment". This makes the necessity of proving causation more clear.

In Fisher v. Flynn 598 F. 2d 663 (1979), (U.S.C.A. 1st Cir.) as assistant professor of psychology was dismissed after having refused the sexual advances of her department head. Campbell, C.J., however, refused the plaintiff's claim since she had failed to show that there was a causal connection between her refusal to comply with the sexual propositions and her eventual dismissal. The Court stated that rather than there being an actionable complaint, the incident merely was a "unsatisfactory personal encounter with no employment repercussion" (p. 666).

A similar result was reached in the case of Clark v. World Airways Inc. 24 E.P.D. P. 31,385 (1980). There, the plaintiff, during her first week of employment, met the president of the defendant firm. He made off-colour remarks to her and touched her in ways that she found to be offensive. The plaintiff rejected more explicit sexual advances and eventually resigned because of the harassment she received.

The Court stated that even where a plaintiff resigns, rather than is dismissed, a claim may be brought under the Civil Rights Act. However, in such a situation, the plaintiff will have greater difficulty in showing causation.

In any event, Greene D.J. found that the plaintiff had failed to show that her compliance with the president's sexual demands was a term of her employment. He stated that the Civil Rights Act does not apply with respect to "sexual relationships arising during the course of employment that have no substantial effect on that employment".

(p. 18,289).

In other words, a plaintiff has a heavy burden of proof to discharge. She must show that her rejection of sexual advances brought about her dismissal or created a situation where she could no longer remain in her job. In the latter situation, it will be particularly difficult for the plaintiff to show that her response to the harassment was warranted under the circumstances.

In the most recent U.S. decision, however, the Court showed a willingness to relax the burden of proof on the plaintiff in sexual harassment cases: Bundy v. Delbert Jackson 641 F. 2d 934 (1981), (U.S.C.A. D.C. Cir.) In that case, the plaintiff had received propositions from her supervisors and rejected them. When she complained to a superior officer in the institution, he too propositioned her. She then began to be criticized by her supervisors and felt that her opportunities for promotion had been impaired.

The plaintiff's argument in the case was that it should be unnecessary for her to show that there were tangible employment consequences, in the sense that benefits were denied to her as a result of her rejection of sexual propositions. Rather, it was argued, she should only have to show that her employment circumstances were "poisoned" by the harassment.

The Court accepted that reasoning and decided that the principle in Barnes, supra should be extended:

> Thus, unless we extend the Barnes holding, an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking other tangible actions against her in response to her resistance, thereby creating the impression ... that the employer did not take the ritual of harassment and resistance "seriously". (p. 945)

In so holding, the Court referred to cases where ethnic and racial slurs had been found to constitute a violation of the Civil Rights Act. Where the work environment alone is affected, there has been found to have been a breach of the Act. The Court stated that an analogy could be made between those cases and sexual harassment cases:

> How then can sexual harrassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal? (p. 945).

The Court also found support in the Guidelines on Sexual Harrassment issued by the Equal Employment Opportunities Commission 29 C.F.R. s.1604.11:

> (a) Harassment on the basis of sex is a violation of s.703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

The evolution of these cases shows how the courts have attempted, in some instances, to read the Civil Rights Act broadly to bring sexual harassment within its prohibitions. The problem has become, then, one of determining what is prohibited harassment and what is purely a personal matter. In the Bundy case, the Court extended the meaning of "term or condition of employment" to cover all harassment in the workplace regardless of the presence or absence of tangible employment consequences. This interpretation, no doubt, goes a long way toward remedying an insidious form of sex discrimination. Yet, equally, it points out the need for specific legislation in the area.

Interestingly enough, the Bundy decision is very similar to the Ontario case of Bell, supra. There, Mr. O.B. Shime Q.C. stated that the "taunting" of female employees could amount to a violation of the Ontario Human Rights Code. Thus, the U.S. and Ontario position seems to be equally broad, and equally in need of specific legislation.

In Ontario, there is pending legislation which will make specific reference to sexual harassment as a prohibited employment practice: Bill 7, An Act to revise and extend Protection of Human Rights in Ontario (2nd reading: May 25, 1981). Section 6 of the Bill provides:

> 6. Every person has a right to be free from,
>
> (a) a persistent sexual solicitation or advance made by a person in a position of authority who knows or ought reasonably to know that it is unwelcome; or

> (b) a reprisal or a threat of reprisal by a person in a position of authority for the rejection of a sexual solicitation or advance.

This provision makes it clear that harassment needn't have employment consequences in order to be a prohibited practice (s. 6(a)). Unwelcome solicitation in itself will constitute a violation of the Code. Retaliatory action by a supervisor, for example, would fall under a separate prohibition (s. 6(b)).

Sexual harassment in the workplace is a significant, real problem for working women. [1]

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1. See, for example, Sexual Harassment: A Hidden Issue, The Project on the Status and Education of Women, Association of American Colleges, 1818 R Street, N. W., Washington, D. C. 20009; Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination, New Haven: Yale University Press, 1979.

3. The Evidence

Three complaints (Exhibit Nos. 11, 12 and 13) were signed by the complainant, Teresa Cox, but they are the same except for changes in the legal description of the Respondents. (Transcript, p. 39). Similarly, two complaints (Exhibit Nos. 14 and 15) were signed by Debbie Cowell (Transcript, p. 41).

Ms. Cowell, 23, resides in Guelph. She testified she was hired July 27, 1978, commenced work the following day, and that Mr. Gadhoke's advances commenced with that first day of work (Transcript, p. 62), and continued the second day and daily thereafter (Transcript, pp. 64 to 66). She testified:

> "Q. You've used this term "mauling you". Could you describe what you meant by "mauling you"?
>
> A. Touching me.
>
> Q. Where would he touch you?
>
> A. On the arm, caressing my back; he tried to get his hand down my shirt a couple of times and the looks that he would give me - it was sort of scary like he'd look right through me." (Transcript, p. 64)
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> . . . .
>
> "Q. How many occasions? Can you give us an idea of how many occasions these events would happen on a daily basis?
>
> A. He tried everytime there was no one in the shop.
>
> Q. And what would be your response -- what would your response be on these occasions?" (Transcript, p. 66)
>
> . . . .

"A. Yeah, he tried when -- like if I was going for buns or going for bags or something in the back room.

Q. What would happen?

A. He would try to grab me and I would get out of there as fast as I could.

Q. When you use the term "grab", can you elaborate what you mean by that?

A. Well, he would try and grab my waist or try and caress my back or arm." (Transcript, p. 70)

. . . .

Ms. Cowell finally quit her employment with Mr. Gadhoke about September 5, 1978;

"A. I finally got -- I finally got fed up up with it; that it was never going to get any better, that he was still going to -- he would never ever leave me alone and it would probably get worse and I was afraid that maybe he would try something more than what he had." (Transcript, p. 75).

Ms. Cowell was unemployed until January, 1979. She received some $58.00 a week in unemployment insurance during this period. She had made about $90.00 per week through her employment with Mr. Gadhoke. (Transcript, p. 76).

Teresa Faye Cox, 21, of Guelph, was employed by Mr. Gadhoke between March 16, 1979 and June 22, 1979. She testified that on the first day of her employment, he invited her for a drink afterwards, trying repeatedly to put his arm around her while in the car on the way to the bar. (Transcript, p. 94) She testified further:

"A. Right, it's a bar, type thing, a hotel probably something like that. And I was -- well they ordered a drink and the drinks came and then I was sitting there -- I was talking to Vince and all of a sudden I felt this pressure on my leg and I looked down and here he had put his arm on my -- his hand, Jake, his hand on my upper thigh and he would start to move it up, type thing, up and back. I saw it and I went like this and I threw it back on his own lap and I said I'm not that type, I said leave me alone and lay off, type thing. And well, he didn't do anything for a while and I was looking at him, I was watching him and didn't do anything, so I figured well he's got the message. And then maybe about an hour later, I turned around and I felt something on my leg again and I turned around and I whacked his hand and he went like this and drew it back, that's Jake and I turned around and I said 'lay off, you are driving me up the wall'." (Transcript, pp. 95 and 96)

After leaving the bar, she testified that:

"And when he stopped the car, he turned around and I saw his hands come at me; he went to grab my face to try and kiss me and I saw his hands coming; I put my hands out like this and just pushed him back and I told him to, I don't know, I just said something like 'buzz off' again or 'keep your hands to yourself', something like that."

. . . .

"Q. What if anything, happened after that?

A. Well, he went in and I was pretty upset; I started crying and I started shaking and Vince was sitting there and he tried to calm me down; he started telling me that things would be all right and to just take it easy and everything like this. When he came back I went to my place and when I went to get out of the car, well then he tried to kiss me goodnight again." (Transcript, p. 97)

Ms. Cox also testified as to other incidents at work:

"A. No, you were on the shift by yourself. Okay, and he had come from somewhere else in the shop and just very slowly, silently sort of crept up behind through this partition and very slowly up behind me and then when he was behind me -- like he did a number of things all at once -- he got up behind me and then all of a sudden his hands would come around

he'd grab my chest and he'd start squeezing all at the same time, like one, two, three, one right after the other -- like before you knew what was happening he was there and had you. And when he did that, I turned around and elbowed him with my elbow and he stepped back and I turned around and I said 'I'm not that type of girl, I says leave me alone, I said I'm not interested.' And he said, oh yeah, he said 'sure, sure, they all say that', type thing, and then he turned around and left and he was gone for a while and then he came back and when he came back --- The next thing he tried to do was grab my seat.

Q. Physically tried to grab part of you?

A. Yeah." (Transcript, p. 102)

. . . . .

"A. Okay, other things. He -- okay, once I remember I was -- okay, this time -- a lot of times he would do something up front; most of the time he did it in the back, but a lot of time you'd be standing behind the counter and he'd pull something.

Q. What would he do?

A. Okay, I was standing there and I was bent down putting something on one of the shelves and he came up and while I was still bent, he reached out and then he grabbed my face and sort of pulled it -- grabbed it -- pulled me sort of up at the same time and he tried to kiss me and I turned my neck like this, right out of the way and shoved like that.

Q. Shoved like that, you are showing your hands motioning out in front of you, shoving like that?

A. Yeah.

Q. Was this happening frequently or infrequently?

A. He tried that quite often. Like there was -- in the first month he would try something about three times a day and that was one of the ones that he tried was in the first month, of those three it was very common. And, the grabbing of the chest was another one that was very common, about once a day in the first month, he'd try that one." (Transcript, pp. 104, 105)

. . . . .

"Q. So he would be behind you -- he would get you into a position where you would be in front of him and he would be behind you.

A. Yeah, he usually -- everything he did was from behind, or from the side; it was never usually directly right on. And, when he did that well then he -- I would turn and use my feet because my hands were like this because automatically I'd put my hands up.

Q. So you are saying that his arms would be around and incapacitate your hands?

A. Yes.

Q. What would you do?

A. Well, the only thing left was I kicked him in the shin, that's usually the spot I hit him quite often.

Q. What would happen?

A. He'd let go because it hurts when you kick in the shin. And his automatic reaction would be this -- sort of jump and at the same time let go.

Q. How often would a situation like this occur?

A. This one was less frequent that the other two. Maybe ---

Q. During the period of your employment did it happen more than five times or less than five times?

A. Oh, frequently; everything happened frequently. That would happen about once a week in the first month. And the other one -- he got away with once and after that, no way. He attempted after that but ---

Q. I'm sorry, when you say "got away with it", and that was it, what are you saying?

A. Okay, it's an incident -- I was going to describe it.
Okay, I was -- okay well, it can be either well, to the side -- I was -- try to get your position going here. I was standing there and sort of turned and he came up, this way and okay -- I was looking for other things, I wasn't looking for him to pull this one and he came up and as soon as he got up to me, he reached out his hand

> and literally grabbed me by the crotch and at the same time he grabbed, he squeezed. And, I turned around and I just -- I kicked him in the shins again and I told him to go to hell or something -- I was pretty upset at that point when he tried that one. He got away with it once and then after that, whenever he came near me I automatically -- whenever I heard footsteps -- or as soon as he got in the shop I would put myself in such a position that I could see where he was at all times and I'd never bend down when he was around; after about the first month I was really worried.
>
> Q. This incident that you've described; what would be his reaction after you would kick out at him in this case, what was his reaction?
>
> A. Well he had this attitude that when a girl said no, she meant yes; that every girl that said no meant yes and when she yes, she meant yes, so you couldn't win either way." (Transcript, pp. 105 to 107)

. . . . .

> "Q. By trying something; can you tell us what; can you give us an example please?
>
> A. Well like, grab me by the chest or when he'd grab my face and tried to kiss me, grab my seat, grabbing me in a bear hug and when he had me in the bear hug, when he tried that stunt, he'd try -- his hands -- he'd try start sliding his hands up my top. He pulled that one a lot of time afterwards." (Transcript, p. 114)

Ms. Cox suffered emotionally because of Mr. Gadhoke's treatment of her, (Transcript, pp. 114 to 120, 132,143, 156, 157) tried unsuccessfully to find another job, and continued to work for him a while as,

> "... I felt that I had to have a source of income coming in and that, hopefully, that I could just put up with him and so that I'd have that income." (Transcript, p. 118)

Her sister, Karen Cox, testified that Teresa was very nervous, and often hysterical, due to her relationship with Mr. Gadhoke (Transcript, pp. 154, 156, 157, 161, 162), and that she was prescribed a muscle relaxant by a physician (Transcript, p. 168).

After leaving Mr. Gadhoke's employment, Ms. Cox returned to school in September, receiving some welfare payments over the summer. (Transcript, pp. 144 - 146; Exhibit No. 21).

Donna Marie Speaker, who was employed by Mr. Gadhoke between July 6, 1980 and October 19, 1978, testified that on two occasions Mr. Gadhoke had placed his hands on her. (Transcript, pp. 200, 201). Francis Ann Kent worked for Mr. Gadhoke from September 17, 1978 to September 30, 1978. She testified:

> "Q. Can you describe for us how he was handling you?
>
> A. Well, the first incident happened when I cut my finger at the meat-cutter and he was really concerned and he would start to brush past my bust and his hands would slide down to my bum. And every day this would occur, like more and more.
>
> Q. How would you react to this?
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> A. I told him to stop it and he just refused to take no for an answer.
>
> Q. Did the handling increase or decrease?
>
> A. Basically the same, sometimes a little bit more, but it never decreased, no." (Transcript, pp. 209, 210)

Mrs. Lucille Margaret Pernfuss testified that on July 18, 1979, while eating an ice cream cone in a car outside Mr. Gadhoke's Great Submarine Shop at Speedville and Woolrich Road in Guelph, she observed Mr. Gadhoke inside the shop.

> "A. Well he went into the store and went behind the counter and then came out where there was a little girl, I would say between 15 and 16 years old, standing. He put his arms around her, he snuggled his head in her neck. He put his arms -- his hands up and down her body and then came out of the store."

. . . . .

"THE CHAIRMAN: When you say his hands went up and down her body, where abouts would his hands have gone?

THE WITNESS: Well, his hands went down the front and down the back and up again." (Transcript, p. 217).

Upset by the incident, Mrs. Pernfuss mentioned it to her daughter the next day, only to learn that her grandaughter was employed by Super Great Submarine. Mrs. Pernfuss then reported the incident to the Chief of Police, and her gradaughter ceased to work for Mr. Gadhoke. (Transcript, pp. 219, 220).

Mrs. Pernfuss' grandaughter, Linda Blair, age 16 at the time, testified that on the first night she worked for Mr. Gadhoke,

"A. Well he kept grabbing my face and attempting like he was going -- he was trying to kiss me."

. . . . .

"Q. Did anything else happen that evening?

A. When he went by me, he brushed his hands across my rear." (Transcript, p. 225)

Laura Livingstone worked for Mr. Gadhoke for two days in March, 1979. She testified,

"A. ... And he came in about 11:00 and he told me to come here. He was in the back room where the grill was. So I went back there and he puts his arm around me and he says that there is something going on, he thinks, between Teresa and Vince and I went -- I didn't know what to say. And then he says -- he wanted me to give him a kiss good-bye. And then I said, 'I'm sorry, I have to go home.' And I just moved away from him and then he said, 'give me a kiss good-bye.' And I said, 'I have to go, my parents called', which they hadn't, but I had told him that because he was scaring me." (Transcript, p. 234)

Testimony was given by Barbara Hancock, age 18, an employee of Mr. Gadhoke, who had worked for him for about one year. Statements supporting Mr. Gadhoke were signed by Ms. Hancock (Exhibit No. 25) and by another former employee, Kelly Weadick (Exhibit No. 26) and filed as evidence.

Ms. Hancock testified that she herself had never had any problem with Mr. Gadhoke (Transcript, p. 300) nor had she heard any complaints from other female employees about Mr. Gadhoke's behaviour (Transcript, p. 289). However, Ms. Hancock's memory was somewhat uncertain, and notes by the human rights investigating officer, Mrs. Dorothy Barnes, of an investigating interview of January 14, 1980 (Exhibit Nos. 27 and 27A) with Ms. Hancock indicate that Ms. Hancock had in fact knowledge that Teresa Cox was indeed complaining about Mr. Gadhoke's behaviour toward her. (Transcript, p. 318 - 320, 322). Indeed, Mrs. Barnes' notes of the interview of Ms. Hancock state that Ms. Hancock said:

> "Q. ... "The first night I worked there -- I was locking the doors -- he grabbed my shirt on my shoulder, and I told him I don't need the job, and to lay off. He didn't try it again. He knew I wasn't going to let him touch me." (Transcript, p. 334)

Mrs. Barnes impressed me as a capable and conscientious investigating officer, and I am certain that her investigating report accurately reflects the conversation she had with Ms. Hancock.

Mr. Gadhoke implied in his evidence in defence to the complainants and the complainants' testimony, that some of his employees, including the complainants, had pursued wage claims against him, and it was only for this reason that the accusations arose as to his being in violation of the Ontario Human Rights Code (Transcript, p. 434, 442). I find on the evidence that this contention has no basis. The complaints before this Inquiry have nothing to do with whatever problems Mr. Gadhoke had with employees over wage claims.

A second response of Mr. Gadhoke to the complainants was that he had problems with their performing their job, and that they quit because of his dissatisfaction and criticism in this regard. (Transcript, pp. 434, 435, 436, 438). Indeed, he suggested in his evidence that he had fired them. (Transcript, pp. 436, 437) I reject his evidence in this regard. On all the evidence it is clear that both complainants performed their employment satisfactorily and that the only reason they left their employment with Mr. Gadhoke was because of the fact of his sexual advances, his treatment of them due to their rejection of such advances, and his refusal to cease such advances.

As well, he asserted that the complainants were abnormally nervous, and that for this reason they did not understand him and misinterpreted his words and gestures, particularly because he is, as he says, "by nature free and friendly". (Transcript, pp. 441, 446, 448, 502).

While it is apparent from the evidence that Ms. Cox is of a nervous nature, it is clear as well from the evidence that both complainants quite accurately interpreted Mr. Gadhoke's words and actions as being sexual advances, and that his conduct in this regard affected them adversely psychologically, and to the point they just could not take it any more and terminated their employment.

Mr. Gadhoke made the additional assertion that it was the complainants in fact who made sexual advances toward him. (Transcript, pp. 443, 444). I reject this accusation, which is ridiculous nonsense.

Finally, he testified that he was generally critical of their moral behaviour and that as a result of their resentment to his criticism in this regard, they "wanted to get ... something [on him] ". (Transcript, pp. 445, 446, 501). This accusation as well is, as I find on the evidence, simply nonsense.

Finally, Mr. Gadhoke admitted that he might have touched the complainant, Teresa Cox, on occasion but that he did so accidentally and without the intent of such touching being sexual advances. (Transcript, pp. 450 - 453). I have no doubt that Mr. Gadhoke intended to touch both of the complainants, as they testified, and that he did so by way of making advances that were sexual in their motivation and nature.

Mr. Gadhoke wrote letters to officials at the Ontario Ministry of Labour (Exhibits Nos. 35 and 36) critical of the fact that he was being investigated for wage claims, and that he was being harassed in this regard. There was no credible evidence whatsoever in this Inquiry to suggest that Mr. Gadhoke was ever harassed by anyone in respect of the matter before the Inquiry. He also wrote a letter (Exhibit No. 18) to the Human Rights Commission giving his version of his relationship with the complainants, and this letter is purportedly signed by an associate of Mr. Gadhoke's, Vince Le Blanc, but Mr. Gadhoke repeatedly refused the opportunity of calling his associate as a witness. (Transcript, pp. 481 - 490).

It is useful at this point to quote from the two complaints, which I find to be substantiated by the evidence before the Inquiry. The Complainant, Teresa Cox, states in her Complaint (Exhibit No. 13):

> "On or about March 16, 1979, I began employment at the Super Great Submarine Restaurant as a counter person. Almost immediately I began experiencing problems with Mr. Gadhoke my boss. I would be doing some duty like washing dishes, and he would walk quietly behind me and grab me. He would grab me by the breast and squeeze me. Although I told him to keep his hands off me, he still persisted.
>
> He was also in the habit of grabbing me in a bear hug and his hands would then start sliding up my top. Also, he would put his hand between my legs and rub my thigh. His real big thing was to grab me by the crotch and squeeze. I would give him a knock with my elbow.

I can't count the number of times I elbowed him. He would also grab my face with both of his hands, squeeze it, and try to kiss me. At other times I started kicking him in defence. At one time, he attempted to physically abuse me and had his arm raised, his hand in a fist and started to strike. I said to him "You had better not hit me buddy, or I'll have you up for assault". His hand barely missed my face.

One time he tried to persuade me to go to his place for a drink along with one of his workers, a Vince LaBlanc, who supervises when Mr. Gadhoke is not there. Neither myself nor Vince went.

Vince LaBlanc told me Mr. Gadhoke had tried to persuade him to get me to go to his place where they could both "lay" me, but Vince would not go along with it.

I found myself forced to take a hostile attitude toward Mr. Gadhoke as it was the only way to keep him at a distance. Eventually, I found I could not take this situation any longer and resigned on June 22nd, 1979."

The Complainant, Debbie Cowell, states in her Complaint (Exhibit No. 13):

"On or about July 27, 1978, I began employment at the Great Submarine Restaurant as a counter person. Almost immediately, I began to experience problems with my boss. At the end of the first day, he put his arm around my waist and attempted to kiss me. I advised him that I did not appreciate his actions and to not do this again, but he persisted in these actions.

He was also in the habit of attempting to rub my back or breasts and I would have to grab his hand and remove it from my body. Everytime that I expressed my displeasure with his actions, he would tell me not to be silly.

During the week of August 2?, 1978, I was discussing my pay cheque with my employer and a deficiency in the amounts. At this time, he said if I made love to him he would pay me for doing that.

> I was unable to tolerate this situation any longer and was forced because of his actions and constant refusal to leave me alone to resign my job on September 5, 1978."

As I have said, I find both Complaints substantiated by the evidence.

4. Conclusion

On the evidence, there is no doubt that the individual Respondent, Jagjit Singh Gadhoke, sexually harassed both Complainants. From a factual standpoint, sexual harassment can be said to be:

> "unwanted attention of a sexual nature: [an] implied or expressed promise of reward for complying with a sexually-oriented request: or [an] implied or expressed threat of reprisal, actual reprisal, or the denial of opportunity for refusal to comply with a sexually-oriented request."[1]

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[1] Preliminary Report of the Presidential Committe on Sexual Harassment, York University, September, 1980, at p. 3.

In my opinion, the Board in Cherie Bell v. Ernest Ladas, supra, was correct in its view that sexual harassment can be a form of sex discrimination prohibited by section 4 of the Code. Specifically, the factual situation of sexual harassment presented by the evidence before this Inquiry is, in my opinion, prohibited by section 4 of the Code.

The individual Respondent physically and verbally abused both Complainants through his continuing sexual harassment during their employment.

Moreover, there was a real connection between his sexual harassment of the Complainants and their termination of their employment. The Complainants have met the onus of showing that compliance with Mr. Gadhoke's sexual advances was, in effect, a term or condition of their employment. Although they were able to halt his advances in the sense that he did not proceed further when rebuffed, often with mild force being necessary, he persisted in making continued attempts of sexual advances throughout their employment. Even though he knew they objected strongly to his oral and physical sexual advances, he persisted in his attempts and made their subjection to such conduct on his part a term or condition of their employment. It was solely for this reason that both Complainants chose to terminate their employment. They refused to suffer the continuing unsolicited physical contact, and oral

suggestions. Moreover, it is also clear from the evidence that the Complainants' rebuffing of Mr. Gadhoke's advances was to some degree the reason for his harsh criticism of their work performance on different occasions.

There is a causal connection in the instant situation between the sexual harassment and adverse employment consequences. The Complainants could only continue to be employed if they subjected themselves to sexual harassment, a condition of employment forced upon them because they were female employees. The sexual advances, in effect, were the cause of termination of the Complainants' employment. The Complainants' response to the harassment, terminating their employment, was warranted under the circumstances.

In my opinion, the individual Respondent, Jagjit Singh Gadhoke, was in breach of section 4 of the Ontario Human Rights Code, in his sexual harassment of the Complainants. He discriminated against them because of their sex within the meaning of section 4.

The individual Respondent, Jagjit Singh Gadhoke, was the sole shareholder and sole director of the corporate Respondent, Jagbritte Inc. (which carried

on business as "Super Great Submarine and Good Eats"), incorporated June 16, 1977 (see Exhibit Nos. 9 and 10).

Mr. Gadhoke's wife, Surendra Gadhoke, who is separated from him, purchased the shares of the corporate Respondent by an Agreement dated December 17, 1980. (Exhibit No. 29).

At all time material to the Complaints and the Inquiry, Mr. Gadhoke was the supervising employee of the corporate Respondent with respect to the two Complainants, and the corporate Respondent, in reality, was the alter ego of the individual Respondent. As Mr. Gadhoke was the directing mind of the corporate Respondent, it is clear that as a matter of corporate law, the corporation is responsible to the Complainants. It is irrelevant that there was a transfer of Mr. Gadhoke's shares at any time, and particularly after the times material to the Complaints, had passed. Moreover, given Mr. Gadhoke's relationship as the director of the corporations, and being the sole supervisor of the Complainants, the corporate Respondent would also be responsible to the Complainants on the basis of vicarious liability.

As to damages, both Complainants suffered a loss of wages of about $90.00 per week. I think $200.00 in lost wages for each Complainant is reasonable. An employer in breach of the Code should only be liable for loss of wages for a reasonable period of time.

As for general damages, given the circumstances of the sexual harassment, I think substantial general damages should be awarded for the intimidating, hostile and offensive work enviroment suffered by the Complainants because of the discrimination toward them. In this regard, it is clear that Ms. Cox especially suffered psychologically, as known to the individual Respondent.

ORDER

1. The Respondents are jointly and severally liable to pay to the Complainants forthwith the following:

   (a) To the Complainant, Debbie Cowell, as damages for lost wages, the sum of two hundred ($200.00) dollars.

   (b) To the Complainant, Debbie Cowell, as general damages, the sum of seven hundred and fifty ($750.00) dollars.

   (c) To the Complainant, Teresa Faye Cox, as damages for lost wages, the sum of two hundred ($200.00) dollars;

   (d) To the Complainant, Teresa Faye Cox, as general damages, the sum of fifteen hundred ($1,500.00) dollars.

2. The Respondent, Jagjit Singh Gadhoke, shall cease and desist forthwith in the sexual harassment of employees of the corporate Respondent.

3. The Respondent, Jagbritte Inc., shall do whatever is necessary to ensure that the Respondent, Jagjit Singh Gadhoke, ceases and desists forthwith in the sexual harassment of its employees.

Dated at Toronto this 28th day of September, 1981.

Peter A. Cumming
Board of Inquiry